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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS IN AUSTIN, TEXAS

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BRIAN JASON WHITE
APPELLANT

v.

THE STATE OF TEXAS
APPELLEE

APPELLANT'S BRIEF

ON APPEAL FROM THE FIFTH DISTRICT COURT
OF APPEALS IN DALLAS

Submitted by:

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PRESIDING JUDGE
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STATEMENT OF THE CASE

This is an appeal from a felony conviction of engaging in organized criminal activity and a felony conviction of money laundering. Appellant was charged in a five-count indictment with: (Count I) engaging in organized criminal activity, (Count II) money laundering, (Counts III-V) forgery of a contract or commercial instrument. C.R. 15-16. Appellant was tried jointly with co-defendant Ron Robey.

Prior to trial the State dismissed one count of forgery. C.R. 161; IV R.R. 190. The jury acquitted Appellant of the remaining two counts of forgery. C.R. 142-45. The trial court sentenced Appellant in each conviction to ten years confinement and suspended each sentence for eight years, both to run concurrently. CR 146, 161; VI R.R. 65, 67. The trial court ordered restitution in the amount of $32,822.04. VI R.R. 65. Appellant's convictions were affirmed by the Fifth Court of Appeals in Dallas. C.R. 165; *White v. State*, No. 05-15-00819-CR (Tex. App. –Dallas 2017).

ISSUES PRESENTED

I. A proponent of evidence at trial shoulders the burden of proving admissibility upon an Article 38.23 objection; the Court of Appeals' holding that an opponent must first produce evidence of a statutory violation is erroneous.

II. This Court should reevaluate the *Robinson* case to the extent its holding is based upon a presumption that does not exist in every Article 38.23 dispute.

STATEMENT OF FACTS

Appellant was charged and convicted of Engaging in Organized Criminal Activity and Money Laundering. The State accused Appellant and alleged co-conspirators of stealing the U.S. currency of Jason Earnhardt by diverting the profits of Earnhardt Restoration and Roofing. C.R. 17-18; III R.R. 11.

Appellant's defense at trial was that his conduct was part of a legitimate business partnership. V R.R. 19-21. Prior to Earnhardt's accusations against the defendants, the defendants sought the advice of a civil attorney. IV R.R. 73. That attorney advised the defendants that their relationship with Earnhardt was a partnership. IV R.R. 80-81. This legal conclusion was based upon a review of the defendants' contracts and representations made by Appellant's boss and co-defendant: Ron Robey. IV R.R. 87-89. Following the advice of counsel, the defendants filed a DBA in Collin County under the name Earnhardt Restoration and continued conducting business in that capacity. IV R.R. 75.

At trial, Earnhardt was adamant that the defendants were contractors—not partners. However, Earnhardt admitted that he had referred to the relationship as a partnership in the past. IV R.R. 69. Earnhardt's description of the relationship was also consistent with a partnership in which co-defendant Robey held managerial control. III R.R. 156-57. The defendants shared "fifty-fifty" in the profits of the company. III R.R. 180, 192; IV R.R. 80, 98. The defendants were also authorized to act in the name of Earnhardt Restoration and Roofing. IV R.R. 56. During the course of the alleged conspiracy, Appellant did, in fact, act in the name of Earnhardt Restoration and Roofing. IV R.R. 25-42.

To undermine Appellant's defense, the State offered a surreptitiously recorded conversation between Appellant and his alleged co-conspirators. III R.R. 158, IV R.R. 43. The recording purportedly details a conspiracy to conceal criminal conduct whereby co-defendant Ron Robey created fake Craigslist advertisements that flooded the phones and emails of Earnhardt Restoration. This prevented Earnhardt from communicating with those doing business with the defendants. SX 35. This exhibit was the focus of:

- The State's opening. III R.R. 16-17.
- Direct examination of the alleged victim. III R.R. 157-63.
- Cross Examination of defendant Ron Robey. IV R.R. 129-30, 150-57.
- Defense closing argument. V R.R. 15-16

- The State's closing argument. V R.R. 31.
- The Court's deliberation in punishment. VI R.R. 60-65.

The admission of this exhibit is the crux of the instant appeal.

SUMMARY OF THE ARGUMENT

I. A proponent of evidence at trial shoulders the burden of proving admissibility upon an Article 38.23 objection; the Court of Appeals' holding that an opponent must first produce evidence of a statutory violation is erroneous.

Appellant objected at trial to the admission of a surreptitious audio recording and requested the State show compliance with the Texas wiretap statute. The trial court overruled the objection and admitted the recording without receiving any evidence in satisfaction of this burden. Erroneously relying on this Court's opinion in *State v. Robinson*, the Court of Appeals explained that the defendant, as the objecting party at trial, has an initial burden to show illegality before the burden shifts to the State to show statutory compliance. The Court of Appeals upheld the trial court on the basis of Appellant's failure to satisfy this non-existent burden.

Robinson speaks only to the proper procedure in a pretrial motion to suppress. The five-judge majority wrote carefully to leave intact the "normal rule" that the proponent of evidence at trial must fulfill all evidentiary predicates and foundations—including proving statutory compliance upon an Article 38.23

objection. Two of the five-judge majority and one dissenting judge wrote separately to articulate that the State still carries this burden at trial.

This burden allocation is consistent with principles of policy and fairness that underpin rules of evidence. The State's superior control over its own evidence, its presumed knowledge of the circumstances leading to its acquisition, and the judiciary's aversion abetting wrongdoing all justify the requirement that the proponent carry the burden under Article 38.23.

The erroneously admitted recording played a key role in the jury's verdict and the trial court's punishment. It was central to the direct examination of the complaining witness, the State's opening and closing, and explicitly part of the trial court's deliberation in punishment.

II. This Court should reevaluate the *Robinson* case to the extent its holding is based upon a presumption that does not exist in every Article 38.23 dispute.

In *Robinson*, this Court assigned an initial burden to the defendant in a pretrial Article 38.23 hearing on the basis of the Fourth Amendment's presumption of proper police conduct. Article 38.23's exclusionary rule is broader than the Fourth Amendment's. Under the Fourth Amendment, exclusion is limited to evidence acquired by law enforcement, whereas Article 38.23 applies to the conduct of both law enforcement and private citizens. Accordingly, the rationale for assigning an

initial burden to a defendant moving for pretrial suppression fails to hold water in cases where evidence is acquired by a private citizen.

To the extent this Court is inclined to extend the *Robinson* opinion to apply an initial burden to an opponent of evidence at trial, this Court should reevaluate whether a defendant should carry a burden under Article 38.23 without some showing that the evidence was acquired pursuant to police conduct.

ARGUMENT

I. A proponent of evidence at trial shoulders the burden of proving admissibility upon an Article 38.23 objection; the Court of Appeals' holding that an opponent must first produce evidence of a statutory violation is erroneous.

A. In State v. Robinson this Court allocated an initial burden to the movant in a pretrial Article 38.23 suppression but carefully left intact the normal rule allocating all burdens to the proponent of evidence at trial.

A defendant at trial who objects to the introduction of evidence pursuant to Article 38.23 of the Code of Criminal Procedure carries no factual burden—the evidentiary opponent's obligation is nothing more than a timely and specific objection. Tex. Code Crim. Proc. Art. 38.23. The Court of Appeals erroneously interpreted this Court's opinion in *State v. Robinson* to reach a contrary result. 334 S.W.3d 776 (Tex. Crim. App. 2011). The Court of Appeals should have reversed Appellant's conviction on the basis of the State's failure to fulfil its burden of

admissibility: that its surreptitiously recorded conversation of Appellant was obtained without violating the Texas wiretap statute, Texas Penal Code §16.02.

This Court's opinion in *Robinson* was a narrow holding addressing "the allocation of the burden of proof in a motion to suppress under Texas Code of Criminal Procedure Article 38.23." *Robinson*, 334 S.W.3d at 777. *Robinson* involved a pretrial motion in a DWI case whereby the State failed to carry its assumed burden to prove the defendant's blood was drawn by a qualified technician as is required by statute. *Id*. at 778. Limiting its opinion to pretrial Article 38.23 motion hearings, the *Robinson* Court held "a defendant who moves for suppression under Article 38.23 due to the violation of a statute has the burden of producing evidence of a statutory violation." *Id.* at 779.

The majority opinion in *Robinson* was carefully worded to avoid altering the normal rule that a proponent of evidence at trial shoulders the burden of admissibility upon an Article 38.23 objection. *See* 41 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 18:20.50 (3d ed. 2011). This is evident in the concurring opinions written by two in the five-judge majority. Judge Cochran, joined by Judge Hervey, wrote separately "only to distinguish the shifting burdens at a motion to suppress hearing from those shouldered by a proponent of evidence at trial." *Id.* (Cochran Concurrence). Judges Cochran and

Hervey contrasted a movant's initial burden in a pretrial motion to suppress with the proper procedure when objecting at trial:

> Mr. Robinson contends that the State has the burden to show compliance with the state statute concerning the blood draw. Indeed it does—at trial. As the proponent of evidence at trial, the State must fulfill all required evidentiary predicates and foundations. Thus, at trial the State will be required to offer evidence that the blood was drawn by a qualified person before the evidence of the blood, the blood test, and the blood test results are admissible. Its burden at trial is to establish the admissibility of its evidence by a preponderance of evidence.

Id. at 782 (Cochran Concurrence)(citations omitted).

Judge Price joined in this assessment in his dissent:

> In her concurring opinion, Judge Cochran asserts that "at trial, the State will be required to offer evidence that the blood was drawn by a qualified person [presumably, as mandated by Section 724.17(a) of the Transportation Code[1]] before evidence of the blood, the blood test, and the blood results are admissible." Although she cites no authority for this proposition, I believe it to be a correct statement of the law. But, given that the law requires the State to bear the burden of proving that Section 724.017(a) was satisfied as an evidentiary threshold at trial, I fail to see what sense it makes to assign the burden of proof differently when a defendant first broaches the issue in a pre-trial motion to suppress rather than waiting until trial to insist that the State be held to its evidentiary predicate.

Id. at 783 (Price Dissent)(citations omitted).[1] This, according to Judge Price—with current and former members of this Court—is the normal rule: that the proponent of evidence, whatever it may be, "must demonstrate by a preponderance of proof that the proffered item or testimony is admissible." *State v. Medrano,* 127 S.W.3d 781, 791 (Tex. Crim. App. 2004).

At issue in the instant case is a surreptitiously recorded audio exhibit that is purportedly a conversation between Appellant and co-conspirators. SX 35. The parties to the conversation discussed a plan to conceal their conspiracy and flood victim Earnhardt's business with calls and emails generated from fake Craigslist postings. STATE'S EXHIBIT 35; III R.R. 161-63. Regarding its acquisition, the State showed only that the recording was provided remotely to Earnhardt by an individual claiming to be named Brandon. It was admitted over pretrial and trial objections raising the Texas wiretap statute. II R.R. 179-80, 187, 190; III R.R. 159-161. The Court of Appeals upheld the admission of the recording. Relying on this Court's opinion in *Robinson,* the Court of Appeals stated:

> Since appellant never produced evidence of a statutory violation, the State never had the burden to prove that Brandon was the person who recorded the conversation. Therefore, the trial court was authorized in finding the admission of the recording was not barred by Article 38.23.

[1] Professors Dix and Schmolesky argue: "[o]n balance, Judge Price has the better of the argument. There is no reason to shift the burden of proof on the basis of whether the defendant chooses to raise the matter before trial . . ." CRIMINAL PRACTICE AND PROCEDURE, *Supra*.

White v. State, No. 05-15-00819-CR, *8 (Tex. App. –Dallas 2017).

This was in error. The State, as the proponent of the surreptitiously recorded audio, shouldered the burden to show by a preponderance of evidence that one of the parties to the recorded conversation consented to the creation of the recording. *Medrano*, 127 S.W.3d at 791. Not only did the State fail to do this, they made no attempt whatsoever. At every invitation—and even on appeal—the State has declined to even articulate inferences from circumstantial evidence. Indeed, the recording seems shrouded in mystery; the following statement by the prosecutor prior to trial encapsulates its mystique: "it's not even a phone call. It is a recording that is made between – well they're on the phone, but it's not one person calling the other." II R.R. 178. This only further raises the question, "by whom was the recording made?"

Of course, only one theory supports admissibility: a co-conspirator named Brandon who is heard on the recording must be the same Brandon who delivered the recording to victim and sponsoring witness Earnhardt, *ergo* co-conspirator Brandon created and consented to the recording.[2] Yet, aside from this theory lacking evidence in the record, it would require the court to believe, without explanation, that a co-

[2] A person named Brandon is heard in the audio recording and Earnhardt is led by the prosecutor to the conclusory statement that he is the same Brandon who delivered the recording to Earnhardt. III R.R. 158. While Earnhardt was asked to explain why he believed the other two voices were those of the defendants', no similar explanation was offered regarding his conclusion that the third voice was the same Brandon who delivered the recording. *Id.*

conspirator intentionally created evidence of his unlawful conduct and then provided that evidence to the victim.

The lack of evidence permits speculation on both sides. Perhaps co-conspirator Brandon acquired the recording from a third party intending to disclose the conspirators' criminal conduct. In any one of the following scenarios, co-conspirator Brandon would have incentive to mitigate his culpability by getting out ahead of the matter and delivering the recording to the victim Earnhardt:

- A disgruntled administrative assistant secretly recorded the conversation and intended to alert law enforcement. Brandon comes upon the recording while performing his "doing the IT for those guys." See III R.R. 157.

- An Earnhardt customer seeking retribution for non-rendering of services hires an investigator who illegally records the conversation in a manner similar to the defendant in *Long v. State* or *Duffy v. State*. The customer then sends copies of the recording to leverage the members of the group to pay a refund or complete services. No. PD-0984-15, 2017 WL 2799973 (Tex. Crim. App. June 28, 2017); 33 S.W.3d 17 (Tex. App.—El Paso, 2000).

- A phone infected with ransomware creates a recording and a hacker sifting through the data finds this conversation and sends it to the alleged co-conspirators hoping to extort money from the group. See Tim Collins, *GhostCtrl malware that can disguise itself as WhatsApp secretly films you and keeps recordings of your private calls and videos*, Daily Mail Online, July 19, 2017, http://www.dailymail.co.uk/sciencetech/article-4710380/GhostCtrl-disguise-WhatsApp-record-you.html; Danny Palmer, *This scary Android Malware can record audio, video and steal your data*, ZDNet, July 18, 2017 http://www.zdnet.com/article/this-scary-android-malware-can-record-audio-video-and-steal-your-data/ .

The lack of evidence in the record leaves only speculation. Under Article 38.23, the State is the only party that bears a risk of non-persuasion by offering speculation in lieu of facts. This is both logical and fair. The State has control over its own evidence; it should know the circumstances under which its own evidence was acquired and be able to assure its integrity. Rather than force the defendant to use his limited resources to investigate a multitude of theories, the law places the burden on the proponent of evidence at trial facing an Article 38.23 objection. The holding of the Court of Appeals to the contrary is erroneous.

B. The assignment of an initial burden to the opponent of evidence under Article 38.23 is contrary to rules and principles of evidence allocating the burden of proving admissibility to the proponent of evidence.

An evidentiary proponent's burden at trial is historic and well-established.

> [T]he burden of establishing the preliminary facts essential to satisfy any rule of evidence is upon the party offering it. The opponent merely invokes the law; if it is applicable to the evidence, the proponent must make the evidence satisfy the law.

1 J. WIGMORE EVIDENCE IN TRIALS AT COMMON LAW § 18, AT 347 (Tillers Rev. 1983).

Acknowledging this basic principle, this Court has explained:

> In our criminal justice system, the proponent of evidence ordinarily has the burden of establishing the admissibility of proffered evidence. If no objection is made, the

> evidence is generally deemed admissible. However, once an objection is made, the proponent of evidence ordinarily has the burden of establishing the admissibility of the proffered evidence.

Vinson v. State, 252 S.W.3d 336, 340 (Tex. Crim. App. 2008).

The vast majority of evidentiary disputes arising under the Texas Rules of Evidence or Texas Code of Criminal Procedure invoke the normal rule.

- The proponent of evidence has the burden of establishing relevance under Texas Rule of Evidence 401. *Fuller v. State*, 829 S.W.2d 191, 196-99 (Tex. Crim. App. 1995)(overruled on other grounds by *Castillo v. State*, 913 S.W.2d 529 (Tex. Crim. App. 1995).

- The proponent of extraneous offenses has the burden to show compliance with Texas Rule of Evidence 404. *Turner v. State*, 754 S.W.2d 668, 673 (Tex. Crim. App. 1988).

- The proponent of witness testimony has the burden to show the testimony is a matter to which the witness is competent to testify under Texas Rules of Evidence 602 and 701. *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997).

- The proponent of scientific evidence has the burden to demonstrate scientific reliability under Texas Rule of Evidence 702: *State v. Esparza*, 413 S.W.3d 81, 86 (Tex. Crim. App. 2013).

- The proponent of an out-of-court statement has the burden to show the statement falls within an exception to the rule against hearsay under Texas Rule of Evidence 803. *Taylor v. State*, 268 S.W.3d 571, 578 (Tex. Crim. App. 2008).

- The proponent of evidence has the burden of authentication under Texas Rule of Evidence 901. *Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015).

- The Texas Code of Criminal Procedure requires the proponent of outcry evidence establish compliance with Article 38.072. *Mosley v. State*, 960 S.W.2d 200, 202 (Tex. App.—Corpus Christi, 1997).

- The Texas Code of Criminal Procedure requires the proponent of the defendant's confession show compliance with Article 38.22 prior to eliciting testimony on said confession during cross-examination. *Martinez v. State*, 498 S.W.2d 938, 940 (Tex. Crim. App. 1973).

- The Texas Code of Criminal Procedure requires the proponent of laboratory test results show the laboratory conducting analysis was accredited at time of the analysis under Article 38.35. *Haregett v. State*, 472 S.W.3d 931, 933-35 (Tex. App. –Texarkana, 2015).

- The Texas Code of Criminal Procedure requires the proponent of extraneous offenses against children establish compliance with Article 38.37. *Fahrni v. State*, 473 S.W. 3d 486 n. 15 (Tex. App. –Texarkana, 2015).

- The proponent of an out-of-court statement must show the statement is not violative of the Confrontation Clause in a criminal proceeding. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex. Crim. App. 2008).

These burdens are triggered by nothing more than a timely specific objection.

Sometimes, an evidentiary opponent must do more. An evidentiary opponent's burden to show unfair prejudice under Texas Rule of Evidence 403 or the burden of proof which follows an objection that a matter is privileged under Texas Rules of Evidence 501 *et seq.* are examples of this. However, rules allocating the burdens to the opponent are not made arbitrarily – they are underpinned by principles of fairness and policy.

This much was true according to Wigmore when discussing burdens in substantive law: the allocation is "merely a question of policy and fairness based on experience in the different situations." 9 J.WIGMORE, EVIDENCE § 2486, AT 291 (Chadbourn rev. 1981). On this topic, Professor Edward Cleary provides a more detailed analysis in his Article: "Presuming and Pleading, An Essay on Juristic Immaturity."[3] A burden assigned according to a principle of policy reflects discouragement of disfavored matters, whereas a burden assigned according to fairness is a more logical approach: the party who is in greater control of the evidence supporting or contradicting a particular proposition should be assigned the burden accordingly. Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity*, 12 Stan. L. Rev. 5 10-11 (1959).

Rules of evidence—whether contained in the Texas Rules of Evidence or the Code of Criminal Procedure—are anchored in the principles of fairness. Indeed, the Texas Rules of Evidence even insist upon this: the rules should be "construed so as to administer every proceeding fairly . . ." Tex. Rule Evid. 102.

Each of the bullet-pointed rules outlined above involve scenarios where the burden is assigned to the party with greater control of evidence to prove or disprove the proposition. To highlight a few of these in more detail:

[3] Professor Cleary was the general editor of *McCormick on Evidence* and helped draft the uniform rules of evidence used in federal court.

- Because the proponent of evidence knows the theory of his or her case, the proponent is in a superior position to articulate why evidence makes a particular fact more or less probable and is of consequence to the case. Accordingly, the proponent is assigned the burden of demonstrating relevance.

- Because a presumable familiarity exists between the purported expert and his or her sponsoring party, and the mutual incentive for the exchange of information before trial, the party sponsoring expert testimony has the burden to establish that scientific or expert evidence is sufficiently reliable.

- Because of the State's control over and access to the investigative process, the Code of Criminal Procedure assigns burdens accordingly. Due to the friendly relationship between prosecutor and law enforcement, prosecutor and victim, or prosecutor and state's witness, the State's superior access to the information necessary to help the court understand the manner in which an interrogation was conducted, extrinsic accusations were made, or the circumstances of an outcry statement.

Article 38.23 is no different—the placing of the burden upon the proponent is consistent with the principle of fairness. An Article 38.23 objection is a defendant's objection to evidence acquired by the State, either firsthand by law enforcement, or secondhand via a private citizen's first acquisition.[4] Whatever the case, the State is uniquely situated to learn about the circumstances surrounding its acquisition—the prosecutor is the last stop along the chain of custody. Thus, the State is in greater control of the evidence supporting or contradicting the relevant proposition: whether the evidence was acquired lawfully.

[4] Article 38.23 characterizes the source of inadmissible evidence as that "obtained by an officer *or other person*." Tex. Code Crim. Proc. art. 38.23(a).

Assigning the burden to the proponent is also consistent with Wigmore and Cleary's principle of policy. The American judicial system's distaste for criminal evidence procured by wrongdoing harkens back to *Boyd v. United States*, when the Supreme Court first called for exclusion of evidence obtained in violation of the Fourth and Fifth Amendments. 116 U.S. 616 (1886). Both the Constitutional and the Article 38.23's statutory version of the exclusionary rule have as their primary purpose the deterrence of misconduct. *Self v. State*, 709 S.W.2d 662, 668 (Tex. Crim. App. 1986). But, of equal importance is the policy of judicial integrity. *See Brown v. Illinois*, 422 U.S. 590, 599 (1975); *Starkey v. State*, 704 S.W.2d 805 (Tex. App.—Dallas, 1985). In this regard, the integrity of the court is compromised by assenting to or entertaining evidence by wrongdoing and becoming "the abettor of iniquity." *Precision Instrument Mfu. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 815 (1945). What follows, according to Wigmore and Cleary, should be an assignment of an evidentiary burden which discourages such wrongdoing and the utilization of the court to abet iniquity.

With these considerations, there is no articulable reason to depart from the normal rule that the proponent of evidence show admissibility of proffered evidence in the case of an Article 38.23 objection at trial.

C. The erroneous admission of the surreptitious audio recording was harmful to Appellant in both the guilt-innocence stage of his trial and in punishment.

The erroneous admission of the surreptitious audio recording contributed to Appellant's conviction and punishment. *See* Tex. Rule App. Proc. 44.2.

Appellant was a subordinate of his co-defendant Ron Robey. According to the alleged victim Earnhardt, Appellant fit into the hierarchy as follows:

> Q: How was the hierarchy set up between Roberts, Robey, and White?
>
> A: Robey hired White and Roberts.
>
> Q: Did that mean he was entitled to some percentage of the money that the other two brought in?
>
> A: Yes.
>
> Q: Was he kind of their boss or is that inaccurate?
>
> A: I wouldn't say boss. He was supposed to guide them and teach them the way that, you know, we did things at Earnhardt, how to sell our way, how to represent the name and the brand. But I would say he could be seen as a boss easily.

III R.R. 156-57. Earnhardt later admitted that he considered this "a partnership of sorts" and that the co-defendants operated a "business within a business." IV R.R. 69.

Whether partner or contractor, Appellant and his superior shared in the profits of the Earnhardt business, and they were both authorized "to act in the name of Earnhardt Restoration and Roofing." IV. R.R. 56. During the course of the alleged criminal conduct, Appellant continued to perform the legitimate functions of an employee of a roofing company. IV R.R. 25-42. When a dispute arose among the parties, Appellant and Robey filed a DBA in Collin County pursuant to the advice of an attorney. IV R.R. 74. This advice was given pursuant to a representation by co-defendant Robey that a fifty-fifty partnership existed together with a contract also describing the existence of a partnership. IV R.R. 81, 87-89.

The surreptitious audio represents the only evidence suggesting Appellant was aware of malicious acts aimed to conceal criminal conduct. It was utilized to defeat the defense theory that the co-defendants operated as a partnership with the alleged victim Earnhardt. It further eliminated any doubt that Appellant could have been misled by his boss and co-defendant Ron Robey. Indeed, these were the arguments made by the State when the prosecutor played the recording for the jury in closing. V R.R. 32.

In punishment, the Court explained how the audio was relevant both to punishment and in the guilt innocent phase:

> All right. The reason the Court asked to have State's Exhibit 35 played back to me after I read the Presentence

Investigation Reports, because in the report – I'm specifically referencing right now – Mr. Robey stating that he didn't think he did anything wrong. I find that hard to reconcile with the audio recording where it's clear to the Court, and obviously it was clear to the jury that Mr. Robey knew exactly what he was doing. And when using words like "embezzlement;" that you don't want any type of police detective involvement, all of those sorts of things, then certainly you know what you're doing is not right.

* * *

The second thing is not only did you steal with this whole web of lies, it wasn't enough for you to take the money, as the State has said. You're trying to start your own business. So, it wasn't enough just to divert the funds. Then you wanted to bury him. . . .

* * *

The statements on the audio: We're playing the game until the game is over. It's important to protect ourselves. Everyone has a family to feed. But everyone included Mr. Earnhardt, and you weren't thinking about his family when you were stripping him of everything coming in. . . .

* * *

On the Craigslist ads, the Court just considers that again to be so over the top. This is so beyond I'm just mad at him and we're going to get him back. The fact that you would go to those measure – I don't even know what type of mind comes up with that we're going to jam up the phones and do all these things in an effort to steal business.

* * *

> . . . that the same heart and mind that says that they love and are following and walking with Christ would be the same person on this audio when he thought no one was listening, the things that you were saying and doing. *So, those are the things that cause the Court pause in this case as it relates to the sentencing.*

VI R.R. 60-65 (emphasis added).

In the end, this case came down to this audio recording. For obvious reasons, the trial court believed jury relied upon it to eliminate doubt as to Appellant's guilt and it played an explicit role in Appellant's punishment. Because the State failed to prove the recording admissible by a preponderance of the evidence, and both the trial court and Court of Appeals misappropriated the burden of admissibility, this Court should reverse and remand this matter to the trial court for a new trial.

II. This Court should reevaluate the *Robinson* case to the extent its holding is based upon a presumption that does not exist in every Article 38.23 dispute.

In *Robinson*, this Court relied upon the Fourth Amendment's requirement that a defendant moving to suppress evidence pursuant to an illegal search and seizure produce evidence which rebuts "presumption of proper police conduct." In doing so, this Court explained "[l]ikewise, a defendant who moves for suppression under Article 38.23 due to the violation of a statute has the burden of producing evidence of a statutory violation."

Cases like the instant one illustrate why such a broad rule is unworkable in every case of Article 38.23 suppression. Here, Article 38.23 should operate to suppress evidence which, by all indications, was acquired by some private citizen. As this court explains in *Miles v. State*, "the Texas Legislature enacted an exclusionary rule broader than its federal counterpart." 241 S.W.3d 28, 34 (Tex. Crim. App. 2007). In order to address the problem of "vigilante-type private citizens" the legislature adopted an exclusionary rule by which "the same illegal conduct [as that of law-enforcement] undertaken by an 'other person' is subject to the Texas exclusionary rule." *Id.* at 35.

There is no rationale for holding private citizens in the same regard as law enforcement when it comes to the investigation of criminal conduct. Assuming it is reasonable to presume proper police conduct under the Fourth Amendment, it must be tied to the fact that officers are sworn, and presumably trained, to uphold state law and the U.S. Constitution. The same cannot be said about private citizens. It follows that if the rationale does not apply, then neither should the presumption.

To the extent this Court might be persuaded against the law and arguments presented *supra*, Appellant would ask this Court to revisit the allocation of burdens under Article 38.23 as articulated in *Robinson*. Any such standard, going forward, should require the State to prove evidence was acquired pursuant to police conduct before the defense must overcome a presumption of proper police conduct.

PRAYER

Based upon the foregoing arguments, Appellant prays for and requests that this Court reverse the decision of the court of appeals, reverse Appellant's conviction and remand the matter back to the trial court for a new trial.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

This is to certify that on November 13, 2017 this Brief was served electronically on the Representative for the State of Texas as follows: Collin County District Attorney's Office at DAAppeals@collincountytx.gov , and on the State Prosecuting Attorney at information@spa.gov . Courtesy copies were also mailed to each of these offices at:

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CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. PROC. 9.4(i)(3)

This is to certify that the word count of this brief, as calculated by Texas Rule of Appellate Procedure 9.4(i)(1), is 5,179 words.

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